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CURRENT TOPICS.

We call particular attention to the masterly article of William H. Hamilton, Esq., of New York City, appearing in this number. It was the prize essay of the Columbia Law School of New York, and its writer may well be proud of it. It has been a long time since we have encountered an article written by one who seemed to have so thorough a familiarity with its subject, and we indulge in the hope that many such contributions may find their way into our columns. It deserves a careful perusal.

Our contemporary, the *American Law Journal*, which thus far we have esteemed, after awaking from a slumber of two week's duration, appears fresh once more, and in resenting our recent allusion to the appropriation by the *Ohio Law Journal* of editorial matter of ours, without credit, (which very same thing has been since done by our "conscientious and scholarly" brethren of the *West Coast Reporter*), while it professes a desire to "dwell together in harmony and brotherly love," avails itself of the opportunity to make an attack upon us (as well as the *Legal Adviser* of Chicago) for an alleged offence of the same character as that "charged to the account" of the *Ohio Law Journal*. While we have as strong a desire for "peace" as the *American*, we think discrimination in favor of other journals, and complimentary allusions to other journals ostensibly by way of comparison, "comes with bad grace" when prompted merely by the fact that such journals may have gone "out of their course" slightly, to give the "vain" little infant a complimentary "lift." Our mission is not to furnish our readers with "taffy" regarding the merits of contemporaries, and an attack prompted by the omission on our part to indulge in it, shows, to say the least, very bad taste. But when a State is so burdened with law journals as Ohio is (having four of them), and when we consider that one of them had to go to sleep for three weeks by reason of its struggle with its subscription list, we cannot affect surprise that its spirits should be low, and that the sourness of the stomachs of its managers should cause them to snarl. This enterprising sheet, the *American Law Journal* charges us with stealing its thunder," to-wit: a certain little squib concerning an article written by James M. Kerr, Esq., an old contributor to our journal, on "the Modern Farce," wherein was set forth what we supposed was the statement by Mr. Kerr in his own language, of the opinions of leading thinkers as to the origin of the jury. We observed it in the *Irish Law Times*, our scholarly Hibernian contempory, and knowing Mr. Kerr's investigations to be reliable, we concluded that our readers should have the results of them. We gave "due credit" to Mr. Kerr, and to the Current, from which we supposed the *Irish Law Times* obtained it. Now it appears that the editor of the *American* thought that Mr. Kerr's article was as good as we did, and published the very thing which we obtained from the *Times*. Though this be the fact, the cases are not parallel. All the *American* said that was original appeared in a line or two. On the other hand, the *Ohio* was kind enough to appropriate our comments bodily. Were we guilty of the very thing which our contemporary implies, the cases are not parallel. But we were wholly innocent, and still believe that the *American* did nothing more than we did, *i. e.* to take Mr. Kerr's conclusions, except by putting an explanatory line over it, which was merely mechanical, and whose originality was nothing to boast over. It is not for the *American* to apologize for the *Ohio*; it has a "mouth with which to speak" and a paper, issued every week, through which it can communicate all proper apologies. We have charged it with dereliction of the duty it owes to its contemporaries. It has sufficient ability, and has had sufficient time, during which to plead its innocence; but, on the contrary, it has maintained stolid silence, thus confessing its guilt, and afraid to show its face for shame. We pardon it. We are perfectly conscious how difficult it is for a law journal to fill its columns with good matter during the hot weather. By appro-

priating our matter, it testified for its good quality. But, as to the *American*, it is calculated to make one laugh "all over one's face" to witness it "taking up the gauntlet," seemingly *in invitum* for one of its rivals. "Verily, the millenium hath come." The Ohio lion is lying down with the Ohio sheep (whose "wool" the last Congress refused to protect, [from its contemporaries]) and now, having had our "little say," let us all in this sweet embrace join, obliterate the past from our memories, and marching solidly towards the common goal, let us "bear and forbear," and "dwell together in harmony and brotherly love," our *Albany* friend, and our esteemed neighbor, the *American Law Review* included, without extra charge. Tickets for the picnic will be issued as soon as date is fixed. P. S. We congratulate the *American* on its resurrection.

RESTRICTIVE COVENANTS IN A CONVEYANCE OF REAL ESTATE.

The subject will be treated under two divisions: first, covenants that restrict the free alienation of real estate, and, second, those which restrict the mode of its use and enjoyment.

First. As to restrictions on alienation.

It will be well at the outset to take a moment's look at that system of English tenures prevailing under the feudal polity viewed with especial reference to our subject. The genius of that system required, as one great factor in the scheme, that landed property be not sold at the whim of the owner—who, in feudal notions, was never but a tenant.[1] It was tenure that firmly bound together the lord and vassal; and alienation would have cut this bond. The general restraint had a reason for its existence; it was the peculiar means which preserved the primitive vigor of that rigorous institution.[2] Nor is there the slightest difference between the legal basis which to-day allows a general restraint on alienation and that which might well have authorized it in feudal times. A reversion or possibility of reverter always remained in the feoffor.[3] The proposition still holds true that wherever a reversion is retained a general restraint on alienation in favor of its owner is valid.[4] Restriction on alienation, therefore, was not only the policy of feudalism, but a logical reason was beneath it. Still, it met with general disfavor, and the famous scheme of subinfeudation followed—a measure bred of necessity to accomplish indirectly what could not be done directly without the lord's consent.[5] Subinfeudation hurt the interests of the powerful barons of England, and against it they opposed the noted statute of *Quia Emptores*, enacted in the reign of Edward I. While the avowed purpose of that statute was to promote the interests of the lord (*vide* its preamable), the ultimate result, as is well known, has been different and far more salutary than was ever contemplated by its ambitious but short-sighted framers. Its great work was to abolish that tenure spoken of above, and to cause the feoffee to take as a purchaser holding under his feoffor's lord or the chief lord of the fee. The right to alien freely was thereby first acquired, and subinfeudation was no longer.[6]

These restrictions are, it is true, usually imposed under the form of conditions. It should be observed however, that while there is a wide and well known distinction between a covenant and a condition, and their respective remedies for breach, yet a void restriction upon alienation imposed by way of condition would also be void if imposed by way of covenant and *vice versa*.[7] The law will not permit its principles to be frittered away by mere form.[8] Adjudications on this point, therefore, under one apply equally well to the other.

In accordance with generally expressed notions upon the question, covenants against alienation are classified as follows; although the propriety of such classification rests mainly upon *dicta* and not upon legal decisions, as will be shown hereafter.

1 2 Bl. Com. 57.
2 4 Kent Com. 443, 12th ed.
3 Coke upon Litt., § 380; 1 Smith's Lead. Cas. 179, 7th Am. ed.
4 Ruggles, Ch. J., De Peyster v. Michael, 6 N. Y. 491.
5 4 Kent Com. 444, 445, 12th ed.
6 1 Washb. R. P. 54, 4th ed.
7 Cruise R. P., tit. xiii, ch. 1, § 29, N. 1, Gr. ed.; Platt Covenants, 569.
8 *Vide* 2 Cruise Dig. ch. 1, § 30 *et seq.*

I. Those which are in general restraint on alienation.

II. Those which restrict it for a limited time.

III. Those which restrict it as to purchasers.

I. A general restraint on alienation sought to be imposed upon an estate in fee is void everywhere. It is so laid down in all the books.[9] An argument founded on supposed grounds of public policy may lead to this result, but to us, the true foundation of the rule is the repugnant natures of the two attempts—to give the principal and to withhold that important incident. Public policy of the State would be best satisfied by banishing restrictions altogether, and yet it is known to give way in many such cases in the law. Indeed there is a maxim—*modus et conventio vincunt legem*. It is therefore by no means an unerring guide; when and when not infringed too much would be the puzzling question.[10] Such a restraint is repugnant to the ownership, and clearly one must fall. The law has wisely, and consistently declared against the former.[11] In the language of Judge Sharswood in Doebler's Appeal,[12] the grantor "cannot make a new estate unknown to the law."

Nor is it necessary to make the covenant or condition void that it should expressly prohibit all alienation. If the practical effect is to produce that result, it is enough. This is well illustrated in the leading case in New York of *De Peyster v. Michael*,[13] where in a lease in fee a "fourth sales" clause was inserted, giving to the grantor one-fourth of the purchase-price on all future sales of the land. The subject was exhaustively discussed and the conclusion reached that the provision practically operated as a general restraint, was repugnant to the grant and was consequently void.

The rule however is not infringed by providing in a deed to several that the estate shall not be subject to partition, as the right of alienation still remains.[14] And it has been held that it does not extend to grants from the United States, which, under the Constitution, may impose any restriction.[15] Nor to a deed of a pew in a church pursuant to a by-law of the society.[16]

Apropos to the general rule above, a restraint on alienation or a provision that there shall be no liability for debt is likewise void though the estate given be for life only; at least, this is so, if there is no clause by which it is to cease and no provision over in favor of another.[17] And in England it would seem that this result cannot be avoided through the medium of a trust.[18] But cases in this country seem opposed to this latter proposition, and in certain cases will allow such a restriction if the life estate is given in trust.[19] And a provision directed against alienation of a life estate with a limitation over in case of its violation, is not unusual and is considered valid.[20] While some of these cases are quite beside the subject itself, yet they serve well to show that it requires something more than the mere caprice of a grantor or donor, to sustain any such restriction. It will be noticed that in them third parties had an interest depending upon the observance and validity of the restriction. Such cases are clearly analogous to the case of a reversioner withholding the right of alienation which he is allowed to do. Viewed in this light they are not at variance; indeed, the arguments of Mr. Justice Meredith in Renaud v. Tourangeau, and of Judge Christancy in the late and well considered case of Mandlebaum v. McDonell,[21] were largely based upon and controlled by this consideration.

II. Restrictions for a limited time.

Since the decision of Large's case,[22] in the twenty-ninth year of Elizabeth's reign, *dicta* of judges and statements of text writers have been numerous to the effect that a restraint for a limited time, if reasonable, may be annexed to a conveyance in fee. Some of these dicta, though often cited as direct

9 Coke upon Litt. 223a; 2 Cruise Dig. tit. xiii, ch. 1, § 22; 1 Washb. R. P. 80, 4th ed.

10 Christiancy, J., Mandlebaum v. McDonell, 29 Mich. 107, S. C. 18 Am. Rep. 61.

11 Waker v. Vincent, 19 Penn. St. 369; Gleason v. Fayerweather, 4 Gray, 348.

12 64 Penn. St. 17.

13 6 N. Y. 467.

14 Hunt v. Wright, 47 N. H. 396.

15 Farrington v. Wilson, 29 Wis. 383.

16 French v. Old South Society in Boston, 106 Mass. 479.

17 Brandon v. Robinson, 18 Vesey, 429; Blackstone Bank v. Davis, 21 Pick. 42.

18 Piercy v. Roberts, 1 My. & K. 4.

19 Rife v. Geyer, 59 Penn. St. 393; White v. White, 30 Vt. 338.

20 Rockford v. Hackman, 9 Hare, 475.

21 *Infra*.

22 2 Leonard, 82.

adjudications, are found in McWilliams v. Nisly.[23] It is noticeable, however, that Coke and Littleton, while on this point, fail to recognize such a distinction or even to advert to it.[24]

The very question has of late, come before the courts in Michigan and Iowa, where, after a masterly discussion and extensive review of the cases, the validity of any restriction, even for the shortest time, was denied, and the distinction shown to be void of reason and good authority.[25] There are also other cases which cannot be well understood except upon the theory that they are in support of this doctrine. We are unable to perceive a logical reason, if repugnancy is the test (to discriminate), between a restriction for all time and one for a period falling short of that; there is at most only a difference in degree. However, the question is quite unsettled, and opposing decisions in Kentucky, though not of much weight, are Stewart v. Brady[27] and Stewart v. Barrow.[28]

III. Restrictions as to purchasers.

Lord Coke says a condition that the grantee shall not alien to a particular person is valid.[29] This question has not required any decision; but doubts from excellent authorities have been expressed as to the validity of even this limited restriction.[30] But it is well understood that the right to purchase cannot be confined to a particular person or class.[31]

Second. We now come to the consideration of the more important as well as practical branch of the subject—covenants respecting the use and enjoyment of real property. This includes covenants regarding other land retained by the grantor as well as that conveyed by him; adjoining land-owners also very frequently enter into covenants of this character, although there be no conveyance. The object usually is to regulate the character and position of buildings; the uses to which they are to be put; the rights and obligations of adjoining owners as to party-walls, division fences and the like; or to provide for a general plan to be observed in the laying out of lots, opening streets and otherwise for the general improvement of land.

There can be no objection to these covenants in the way of a restraint on alienation, or as offending against the rule of perpetuities, because, subject to whatever restrictions, or equities they impose upon the land, it is entirely free to alienation.[32] The grantee need not sign the deed in which there are provisions purporting to bind him as to the use of the land; his acceptance of it will be sufficient.[33] A further question is whether such acceptance is equivalent to a strict covenant on his part as regards the restriction running with the land; and the decided weight of authority also answers this affirmatively.[34] But a recent Massachusetts decision holds that unless the agreement is strictly a covenant under the grantee's hand and seal it will not authorize a suit in the name of the purchaser of the land benefited.[35] The all-important doctrine technically known as "covenants running with the land" will now be considered.

I. From the view of a court of equity.

A distinction is generally drawn between the burden and the benefit. When will the burden or obligation of a covenant in a conveyance run with the land? The resolutions so long ago laid down in Spencer's case cannot materially aid us in solving this question. That case was founded upon a covenant in a case where there was tenure; this is in a conveyance and no tenure. Mr. Smith, and his American editors, in their note to that case, have zealously maintained that in order that the burden may run with the land and bind purchasers, there must be, in all cases, a privity of estate founded upon tenure between the covenantor and covenantee.[36] To this we cannot assent. If it were true, there could be no such thing evidently as the bur-

[23] 2 S. & R. (Penn.) 507; Landon v. Ingram's Guardian, 28 Ind. 360; Cornelius v. Ivins, 2 Dutcher, 376; and it is mentioned as allowable, Washb. R. P. 80, 6th ed.

[24] Coke upon Litt., § 361.

[25] Mandlebaum v. McDonell, 29 Mich. 78; s. c. 18 Am. Rep. 61; McCleary v. Ellis, 54 Iowa, 311; s. c. 37 Am. Rep. 205.

[26] Hall v. Tufts, 18 Pick. 455; Renaud v. Tourangeau, L. R. 2 P. C. 4; Walker v. Vincent, 19 Penn. St. 369.

[27] 3 Bush, 623.

[28] 7 id. 368.

[29] Coke upon Litt. sec. 36.

[30] 4 Kent Com. 132, 12th ed.

[31] Attwater v. Attwater, 18 Beavan 330; Schermerhorn v. Negus, 1 Denio, 448.

[32] Tobey v. Moore, 130 Mass. 448.

[33] Maine v. Cumston, 98 Mass. 317.

[34] Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; s. c. 13 Am. Rep. 556; Burbank v. Pillsbury, 48 N. H. 475; Georgia Southern Railroad v. Reeves, 64 Ga. 492.

[35] Martin v. Drinan, 128 Mass. 515.

[36] 1 Smith's Lead. Cas. 160, 178, *et passim*.

den of covenants in a conveyance of a fee running with the land; except in a State, as Pennsylvania, where the statute of *Quia Emptores*, has never been adopted.[37] Where that statute is in force, tenure between the grantor and grantee is unknown; such a proposition is in the very face of the decisions, and must fall to the ground.[38]

But while we deny tenure or the relation of landlord and tenant as a requisite, it is nevertheless true, that there must be that which the courts, for want of a better name, have styled a "privity of estate."[39] This is but the ordinary relation of parties, resulting from the interest which one land-owner, as such, has in the land of another. In other words—to formulate from the cases a comprehensive rule—a covenant on the part of one land-owner, as such, in favor of another, directly relating to an easement or servitude subsisting between them, or if in a conveyance, directly affecting land itself, will have the capacity of running with the land thus burdened and of binding its subsequent purchasers; without the elements above stated or implied, the covenant is collateral. This is the true principle and one which lies at the bottom of all the cases. In the former category may be ranked such cases as Bronson v. Coffin,[40] where the subject was handled with marked ability.[41] In such cases the covenant is annexed to the easement, which serves as the medium for the requisite privity.[42] On the other hand, cases may be found where the covenant affected the land only in an indirect manner, or was not annexed to any easement and hence collateral.[43]

The question here might arise, how, if in any case there be nothing but covenants and no granting words, such an easement may be created. Doubtless, words of covenant are not the most proper to create an easement, yet they may well have that effect where that is the plain intention.[44]

The much questioned case of Cole v. Hughes,[45] impliedly recognizes the doctrine of the cases cited above, but departs from them, as it is believed with deference, in its application. The case is of too much importance to be passed over without notice. Dean, about to erect a house upon his land, agrees with Voorhees, adjoining owner, that the wall to be erected, one-half on each, shall be a party-wall, and the latter covenanted that whenever he, his heirs or assigns, should use it, he or they would pay the value of the part so used. Both parties sell; defendant purchases Voorhees' lot and uses the wall. Action for the value of the use. Earl, J., "I do not think it did" (*i. e.*, the covenant run with the land). "At the time Voorhees made the covenant he received no interest in land and granted none. * * * * He did not convey to Dean any land upon which the wall was built."

True, he did not convey or receive any land, but this does not meet the case. Did not the agreement create a party-wall, and is it not familiar law that each is entitled to the support of the other's half as an easement? But the court say, that except for the agreement Voorhees would have had a right to use the party-wall without making compensation, it being in part upon his premises. True again, but except for the agreement, the party-wall in all probability would never have existed. The conclusion reached was in direct opposition to the above cited cases of Savage v. Mason and Maine v. Cumston, from Massachusetts, and implies that an easement cannot serve as a medium for the required privity of estate, against the almost unbroken line of decisions.

As regards the benefit of a covenant running with the land, this privity of estate, shadowy at best as it may sometimes seem, appears to have been generally ignored from the first. Here the requirement is that the covenant relate to and concern the land of the covenantee, and that it will benefit the owner by reason of his ownership.[46]

[37] Ingersoll v. Sergeant, 1 Whart. 336.

[38] Bronson v. Coffin, 108 Mass. 180; s. c. 11 Am. Rep. 335; Van Rensselaer v. Hayes, 19 N. Y. 72; Georgia Southern Railroad v. Reeves, 64 Ga. 492.

[39] 2 Wash. on R. P. 284, 4th ed.

[40] 108 Mass. 175; s. c. 11 Am. Rep. 335.

[41] Dorsey v. St. Louis etc. R. Co., 58 Ill. 65; Morse v. Aldrich, 19 Pick. 449; Savage v. Mason, 3 Cush. 500; and Burbank v. Pillsbury, 48 N. H. 475.

[42] Norfleet v. Cromwell, 64 N. C. 1; 70 Id. 634; s. c. 16 Am. Rep. 787; Bronson v. Coffin, 118 Mass. 163; s. c. 11 Am. Rep. 335.

[43] Brewer v. Marshall, 18 N. J. Eq. 337; s. c. 19 Id. 537; Horsha v. Reid, 45 N. Y. 415; Lyon v. Parker, 45 Me. 474; Hurd v. Curtis, 19 Pick. 459.

[44] Rowbotham v. Wilson, 8 H. L. Cas. 348.

[45] 54 N. Y. 444; s. c., 13 Am. Rep. 611, lately followed in Scott v. McMillan, 76 N. Y. 141.

[46] National Union Bank v. Segur, 39 N. J. Law-173; Packenham's case, 42 Edw. III, 3; 1 Smith's Lead. Cas. 150, 169, 7th Am. ed.

The burden or the benefit of a covenant, it is observed, will have capacity to run with the land where, in the one case, there is privity of estate, and in the other, where the benefit directly concerns the land; but granting these elements, it is conceived the real and ultimate inquiry then is as to the intention of the parties manifested by their language or by circumstances.[47]

The foregoing remarks on covenants running with the land are equally applicable to incorporeal hereditaments, as *e. g.* easements and perpetual rents.[48]

II. Restrictive covenants from the view of a court of equity.

Did all covenants in conveyances run with the land at law and so bind purchasers, there would be no occasion for this head. But courts of equity are not bound down so much in the exercise of their powers, and hence resort to them is more frequent, as is indicated by the reported cases. From a theoretical standpoint this has its drawback in that the legal question is invariably waived and passed by without solution.[49]

The equity doctrine was first put upon a firm foundation by the leading English case of Tulk v. Moxhay,[50] and it is now a settled principle that where the purchaser takes with notice of the restricted agreement, whether oral or written, though it create no privity of estate, or strict easement at law, its violation by him will be restrained by a court of equity.[51] The underlying idea here is that of a trust between the parties to be benefited and the covenantor, the latter in equitable contemplation agreeing to hold the land to the use of the restriction. Then a purchaser taking with notice is burdened with the trust. This notice may be actual or constructive. Actual notice explains itself. The record of the conveyance will be constructive notice, provided, of course, the purchaser claims under the covenantor, and it matters not how far back in a series of conveyances the covenant is found.[52] Any circumstances which would put a reasonable man on inquiry will suffice, as *e. g.*, a regular uniformity in a row of houses.[53]

But there are limits, though perhaps not well defined, beyond which even a court of equity will refuse to go. Its interference being a matter of sound discretion, it will be governed largely by the dictates of public policy,[54] and by a just consideration as to whether, in view of a material change in surroundings, it will be effectual to attain the ends sought or to carry out the original design of the parties.[55] Acquiescing in a breach of the covenant sued upon will be a good defense to a suit therefor,[56] but not if the acquiescence be in the breach of another and distinct covenant;[57] nor will the fact that the real damages are merely nominal be any defense.[58] The foregoing observations are also to be applied in favor of purchasers of the premises or of separate parcels intended to be benefited by these equitable restrictions.[59] But it must appear that the benefit was intended to pass as a part of the subject-matter of the purchase.[60]

REMEDIES.

If the restriction be by way of covenant, the remedy, at law, for a violation is damages, or in equity, an injunction. A clause liquidating the damages in case of breach does not necessarily supersede the equitable remedy by injunction.[61] Let the restriction take the form of a condition, and the proper remedy is the legal action of ejectment to forfeit the land.[62] Sometimes the deed is so drawn as to embody both a condition and a covenant, and in this case the grantor has his election of remedies.[63]

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47 *Vide* Dwight, C., Brown v. McKee, 57 N. Y. 684; and Phelps, J., Kellogg v. Robinson, 6 Vt. 280.

48 Sterling Hydraulic Co. v. Williams, 66 Ill. 393; Van Rennselaer v. Read, 26 N. Y. 558.

49 *Vide* Western v. MacDermott, 2 Chan. App. 72.

50 11 Beav. 571; s. c 2 Phillips, 774.

51 Kirkpatrick v. Peshine, 24 N. J. Eq. 206; Tallmadge v. East River Bank, 26 N. Y. 105.

52 Burbank v. Pillsbury, 48 N. H. 475; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; s. c. 13 Am. Rep. 556.

53 *Vide* Sutherland, J. Tallmadge v. East River Bank, 26 N. Y. 111.

54 Keppell v. Bailey, 2 My. & K. 517; Brewer v. Marshall, 19 N. J. Eq. 537.

55 Trustees of Columbia College v. Thacher, 87 N. Y. 311; s. c. 41 Am. Rep. 365.

56 Gaskin v. Balls, L. R. 13 Chan. Div. 324.

57 Lattimer v. Livermore, 2 N. Y. 174.

58 Kirkpatrick v. Peshine, 24 N. J. Eq. 206.

59 Barrow v. Richard, 8 Paige 351.

60 Renals v. Cowleshaw, 38 Law Times, 503; 41 id. 116.

61 Phœnix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400.

62 Cowell v. Springs Company, 100 U. S. 55.

63 Stuyvesant v. Mayor, etc. 11 Paige 414.

ESCROWS.

We all know that an escrow is an instrument delivered upon condition; an instrument which, if the condition is performed, becomes an effective instrument; but, if the condition is never performed, never becomes an effective instrument. But the conditions requisite to constitute an escrow are not so generally known. In several respects the doctrines on this subject, to be found in the old books, have been greatly modified by modern decisions, and as there is a lack in the text-books of exposition of the present law on the subject, we may, perhaps, afford our readers some assistance by a short review of it.

We may, first of all, consider the question to whom the escrow may be delivered. Coke lays it down[1] that "if a man deliver a writing sealed to the party to whom it is made as an escrow, to be his deed upon certain conditions, this is an absolute delivery of the deed, being made to the party himself. * * * But it may be delivered to a stranger as an escrow." The first proposition was well supported by authority. There was a resolution to that effect in Thoroughgood's case;[2] and in Whyddon's case,[3] it was decided that "the delivery of a deed cannot be averred to be to the party himself as an escrow.[4]" The reason given for the doctrine is that "the law respects the delivery to the party himself, and rejects the words which will make the express delivery to the party upon the matter no delivery." Sheppard's Touchstone[5] mis-states this doctrine, and lays it down that "the delivery of a deed as an escrow is where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed." The doctrine was, not that the deed must necessarily be delivered to a stranger, but that it must not be delivered to the grantee or covenantee. So far as we know, the ancient doctrine has never been expressly reversed so far as it relates to actual delivery of a deed at the time of sealing to the grantee or covenantee himself, and it was expressly recognized by Crompton, J., in Pym v. Campbell.[6] But it has been considerably modified by the observations of Hall, V. C., in Watkins v. Nash.[7] In that case a re-conveyance was executed by one of two trustee-mortgagees expressly as an escrow, conditional on payment of the mortgage debt, and was left by him with his co-trustee. The co-trustee afterwards also executed the re-conveyance expressly as an escrow "upon the faith of an undertaking that the business should be forthwith settled," and handed the re-conveyance to the solicitor of the mortgagor. This was held to be a good delivery as an escrow, and the learned Vice-Chancellor in his judgment remarked, as to the execution by the first co-trustee:[8] "It is said that the deed thus executed could not be called an escrow, because it was not delivered to a stranger; and that is, no doubt, the way in which the rule is stated in some of the text-books — Sheppard's Touchstone for instance; but, when those authorities are examined, it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A. B. to be held conditionally; but, when a delivery to a stranger is spoken of, what is meant is a delivery of a character negativing its being a delivery to the grantee or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if, upon the whole of the transaction, it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument." So far the judgment merely correctly explains the effect of the old doctrine. But, as to the execution by the second co-trustee, the learned judge said he saw no difficulty in holding that if it were a delivery to the solicitor acting for the mortgagor, "it was a delivery to him as an agent for all parties for the purpose of that delivery." It had been previously held that a deed might be delivered as an escrow to a solicitor acting for all the parties to it,[9]

[1] Co. Lit. 36a.
[2] 9 Co. R. at p. 137.
[3] Cro. Eliz. 520.
[4] See also Hawkshaw v. Gatchel, Cro. Eliz. 835; Williams v. Green, *Ibid.* 884.
[5] Pp. 58, 59.
[6] 25 L. J. Q. B., at p. 279.
[7] L. R. 20 Eq. 262.
[8] p. 266.
[9] Millership v. Brookes, 5 H & N 797

but, having regard to the old cases, it certainly seems a strong thing to hold that an escrow may be delivered to a solicitor acting for the grantee alone.

It is necessary to remember that a deed may either be delivered without words, or may be delivered by words without any act of delivery.[10] Delivery without words meant actual handing over of the instrument to some specific person. For instance, in Chamberlain v. Stanton,[11] the jury found that the defendant signed and sealed a bond "and then laid it on a table, and the plaintiff came and took it." All the justices held that it was not the defendant's deed. According to the modern practice, a deed is invariably delivered by words, and the words do not indicate any specific person to whom the delivery is made. We imagine that the occasions are rare in which there can be said to be an actual delivery by the grantor or covenantor to any specific person. The deed, after it has been signed by the grantor, and the magic words have been uttered by him, is usually left by him on the solicitor's table. Can a deed be an escrow when no particular person is selected as the person to whom it is delivered? According to Vice-Chancellor Hall, in Watkins v. Nash, a deed so executed and delivered may be an escrow, provided there was no delivery to the grantee, and it was intended that the instrument should be incomplete until the conditions prescribed had been performed.

It has long been settled that an express delivery as an escrow is not essential, if it can be implied, from all the circumstances, that the deed was not intended to operate until the fulfillment of certain conditions. As Parke, B., said in Bowker v. Burdekin,[12] "I take it to be now settled, though the law was otherwise in ancient times, that in order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words, but you are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction; and, therefore, although it is in form an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow." What are the circumstances from which such an intention may be inferred? It was inferred in Johnson v. Baker, [13] from the circumstance that a composition deed, after being executed by the surety, was delivered to one of the creditors to get it executed by the rest of the creditors.[14] In Gudgen v. Besset,[15] lease by deed executed by the lessor was held to be an escrow, on the ground that it was retained by the lessor, the lessee being let into possession as tenant from year to year only, until he paid a certain sum for fixtures. In this case Coleridge, J., said that the "detention of the parchment by the plaintiff himself is a fact very significant of what the intention was." On the other hand it was held, in Doe v. Knight,[16] that if a party to an instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his own hands, it is a valid and effectual deed, and delivery to the party who is to take by the deed is not essential. The result of the cases seems to be to show that wherever the whole of the facts lead to an inference that an instrument, although not expressly delivered as an escrow, was not intended to operate until the performance of certain conditions, it will not operate as a deed until those conditions have been fulfilled.

The question whether an instrument has been executed only as an escrow is, in general, a question of fact for a jury; but there is some authority to show that, where the evidence is in writing, the construction of the evidence will be for the judge.[17]—*Solicitor's Journal*

[10] Co. Lit. 36a.
[11] Cro. Eliz. 122.
[12] 11 M. & W. 128.
[13] 4 B. & Ald. 440.
[14] But see Ponsford v. Walton, L. R. 3 C. P. 167.
[15] 6 E. & B. 986.
[16] 5 B. & C. 671.
[17] See Furness v. Meek, 27 L. J. Ex. 34.

DYING DECLARATIONS.

The question of the admissibility of dying declarations arose recently in the case of *Commonwealth v. Bruce* in Pennylvania, where

Bruce was indicted for causing the death of a woman by the administration of drugs, for the purpose of procuring an abortion.

Every one is familiar with the rule that such evidence is competent only when the death of the deceased is the subject of the charge, and the circumstances or the death, the subject of the declarations. In civil cases, they were once received, no lesser lights than Lords Mansfield and Ellenborugh sanctioning their admission.[1] But Baron Parke and Chancellor Kent, looked upon the question in a different light,[2] and their opinion may be considered the sound one in England and this country to-day.

In criminal cases, such declarations were received without regard to the character of the charge until about sixty years ago, when Lord Tenderden declared the rule first quoted.[3]

With regard to two cases in New York and Ohio,[4] to the effect that they are admissible only in cases of homicide, Judge Finletter in *Com. v. Bruce*, says: "In the New York case the learned judge is not warranted by the authorities which he cites in saying 'such evidence is admissible in cases of homicide only if he means that the indictment must charge a homicide in the usual direct terms. That this is his meaning is evident when he says: 'The charge against the prisoner was not homicide in any degree. The crime charged against him is that of persuading the deceased to submit to, etc.' All that is required by the rule is 'that the death of the deceased is the subject of the charge,' and it matters not what the charge may be called. The Ohio case seems to be based upon the the New York case which is cited."[5]

From this short study of the question it appears that everywhere the declarations are restricted (1) to criminal cases (2) to cases wherein the death of the party making the declarations is the subject of the charge and generally (3) "to the act of killing, and the circumstances immediately attending the act and forming a part of the *res gestæ*," and in New York, to cases of indictments for homicide.[7]

[1] Wright v. Letter, 3 Burr. 1255; Averson v. Lord Kinnard, 6 Exch. 193.

[2] Slatsart v. Dryden, 1 M. & W. 615; Jackson v. Vredenburg, 1 Johns. 159. A like ruling will be found in Fredonia v. Railroad Co. 7 Phila. 203, and Barfield v. Britt, 2 Jones (N. C.) 41.

[3] Rex v. Meade, 2 B. & C. 605; Rex v. Hutchinson, per Bayley, J. As following this, see Reg. v. Hines 8, Cox. C. C. 300, (1860); State v. Shelton, 2 Jones, (N. C.) 360 (1855); Hackett v. People, 54 Barb. 370 (1870); Crookham v. State, 5 W. Va. 510 (1871), and Binfield v. State, 19 N.W. Rep. 607 (1884).

[4] People v. Davis, 56 N. Y. 96 (1874); State v. Harper, Ohio St. 78 (1878).

[5] The State v. Bohen, 15 Kan. 407 (1875); Commonwealth v. Read, 5 Phila. 528; Commonwealth v. Gumpert, 6 Luz. Leg. Regt. 187, and Commonwealth v. Chauncey, 3 Ash. 90, were cited and commented upon by the court.

[6] State v. Shelton, 2 Jones (N. C.) 360 (1855); Hackett v. People, 54 Barb. 370 (1870).

[7] People v. Davis, 56 N. Y. 46 (1876).

FALSE IMPRISONMENT—VOID PROCESS—LIABILITY OF JUDGES—LIMITATIONS.

VAUGHN v. CONGDON.

Supreme Court of Vermont.

Where the time for prosecution of a crime is limited and it appears on the face of the complaint that such time has expired, the process issued thereon is absolutely void, and the justice issuing the same is liable for the arrest and imprisonment of the accused, although it was made to appear to him that the offence was but just discovered.

Trespass for false imprisonment. Pleas, general issue, and special plea in bar. Heard on demurrer to the special pleas, September Term, 1881, Rutland county. VEAZEY, J., presiding, sustained the demurrer. The plea alleged that, at the time of the trespasses, defendant was a justice of the peace; that the acts were done by him as such justice without malice; "that on November 12, 1880, W. H. Bond, grand juror of Danby, exhibited to him as aforesaid, his complaint; that Warren H. Vaughn * * * on September 20, 1874, at * * * took, carried away and stole," etc.; that it being made to appear that the larceny of said * * * by said Vaughn complained of as above, had not been discovered until, to-wit, the day said complaint was made to said defendant as justice of the peace as aforesaid, issued his warrant directed to any sheriff, etc., commanding him, etc., to apprehend," etc.

It also appeared that the plaintiff was arrested on said warrant by a sheriff; was brought before the defendant, and such proceedings were had that defendant ordered plaintiff to "find sureties in the sum of $300 for his appearance before the county court." etc.; that the defendant, on the plaintiff's failure to procure bail, issued a mittimus, and that plaintiff was committed to jail thereon.

The statutes require all prosecutions for larceny to be begun within six years.

Redington & Butler, for plaintiff; *W. C. Dunton* and *Edward Dana*, for defendant.

ROWELL, J., delivered the opinion of the court:

The statute provides that complaints and prosecutions for theft shall be commenced within six years after the commission of the offense, and that if a complaint, an information or indictment is brought, had, commenced, or prosecuted after the time limited as aforesaid, "such proceedings shall be void and of no effect." The complaint exhibited to the defendant on November 12, 1880, alleged the offense to have been committed on September 20, 1874, more than six years before the bringing of the complaint, and the question is, whether the defendant had any authority to cause the plaintiff to be apprehended and committed to prison.

It is an elementary rule in criminal pleading that when the time for prosecuting an offense is limited, the indictment must lay the offense within the time limited, or it will be fatally defective, even after verdict. 1 Am. Crim. Law, s. 445; State v. G. S. 1 Tyler, 295; State v. Rust, 8 Blackf. 195; People v. Miller, 12 Cal. 291; People v. Gregory, 30 Mich. 371.

In this case the complaint showed on its face that the statute had run on the offense charged, and thus the defendant had notice that it was "void and of no effect." He had no authority to issue a warrant on such a complaint; and the fact that it was made to appear to him at the time the complaint was exhibited that the larceny had not been discovered till then makes no difference, as the statute began to run from the commission of the offense, not from its discovery. There was no complaint in law. It is the same as though there had been none in fact. He had no jurisdiction of the process, and jurisdiction of the process is as essential as jurisdiction of the person and the subject matter. In Morgan v. Hughes, 2 T. R. 225, it is said that when a person is committed to prison by the warrant of a justice without accusation, some one is guilty of false imprisonment, and that it must be the imprisonment of the justice, who is the immediate and not the remote cause of it. In this State the law makes the same presumption in favor of the jurisdiction of justices that it does in favor of the jurisdiction of superior courts of general jurisdiction. Wright v. Hazen and Gordon, 24 Vt. 143. But presumptions are indulged in only to supply the absence of evidence or averment respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence, or contains an averment with reference to a jurisdictional fact, it will be taken to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, nor that the fact was otherwise than as averred. Galpin v. Page, 18 Wall. 350; Wade v. Hancock, 14 Reporter 672; Freeman Judg. s. 125. Hence it cannot be presumed that the allegation of time in this complaint was a mistake, and that the evidence may have shown that the offense was in fact committed within the time limited. The case must stand on the presumption and ground that the offense was in fact committed more than six years before the complaint was exhibited. It does not stand as it would had the complaint laid the offense within the time limited, but the evidence had shown it without the time. Magistrates of neither superior nor inferior courts are answerable for a want of jurisdiction arising from a mistake of fact that they had no means of discovering nor correcting, nor when they would have had authority to act had the facts been as alleged by the party. Lawther v. The Earl of Radnor, 8 East. 113; Pike v. Carter, 3 Bing. 78; 1 Smith Lead. Cas. 1135. In Aiken v. Richardson, 15 Vt. 500, it was held—as it has been since in Muzzy v. Howard, 42 Vt. 23—that under the statute against arrest and imprisonment for debt there was no competent jurisdiction to issue a *capias* without the requisite affidavit, and that the case was analagous to the cases that proceed on the ground that jurisdiction of the process is as essential as jurisdiction of the person and of the subject matter. And Smith v. Bouchier, 2 Str. 993, was referred to approvingly, which was trespass and false imprisonment against five, who justified under process of the University of Oxford, for that by the custom, a plaintiff making oath that he had a personal action against any party within the precincts of the university, and that he believed the defendant would not appear but run away, the judge might award a warrant to arrest him, and detain him till security was given for his answering the complaint; that the defendant Bouchier made a complaint to the defendant Shippen, the vice chancellor, of a personal action against the plaintiff, and that he suspected the plaintiff would run away; that he took his oath of and upon the truth of the premises, upon which a warrant was granted to the other defendants, whereon plaintiff was arrested. The court held that the custom was not pursued, for that by it the plaintiff was to swear to his belief of the defendant's design to run away, whereas he only swore that he suspected it, which was not the same thing; and the plaintiff had judgment against all the defendants. Wright v. Hazen and Gordan, *supra*, was case for false imprisonment against the party and the justice for an arrest for debt without the requisite affidavit. As to the justice, the pleadings left the case to stand on the fact that the plaintiff was a resident citizen at the time the writ issued, so the plaintiff had judgment on the pleadings; but in view of a repleader being awarded, the court said that all it would be necessary for the justice to show was, that the original writ described the plaintiff as a non-resident, and that he signed it supposing such to be the fact, having no mode of trying that question in advance, and that he was not bound to know at his peril the facts limiting his jurisdiction. This holding would make the justice liable if the original writ described the

plaintiff as a resident, unless the requisite affidavit was filed, for he would then have knowledge of the facts that limited his jurisdiction.

In Carleton v. Taylor, 50 Vt. 220, it is said to be a well settled rule of law that when the court had no jurisdiction of the process it is nugatory and void, and that all persons acting under it are without protection; that if, under our statute exempting from arrest in suits on contracts, the process issues against one not of the class named, or without compliance with the prescribed condition, it issues without warrant of law, and the court has no jurisdiction of the process.

In Merrill v. Thurston, 46 Vt. 732, a justice was held liable where the plaintiff was committed on a warrant issued to bail in a recognizance for an appeal in a liquor prosecution, the recognizance not being one authorizing a surrender of the principal in discharge of bail. That was a stronger case for the defendant than this, for there the facts may fairly be said to have given the defendant colorable jurisdiction, and to have called upon him to decide whether he had jurisdiction and authority to act or not; while here the facts presented had no color of legal value, and the defendant's action in the premises was but the commission of an official wrong.

Whatever the decisions elsewhere have been on the subject—and they are not uniform—we deem it impossible to sustain this plea without overruling several decisions of this court that have long been recognized and practiced upon as the settled law of the State.

Judgment affirmed, cause remanded, and repleader awarded on the usual terms.

VEAZEY and POWERS, J. J. dissented.

NOTE.—Upon such a question it is not surprising that there should have been a division of the court. There is so much unquestionable law in the dissenting opinion of Powers, J., that we here give the substance of it. In speaking of the justice of the peace, he said:

He had general jurisdiction over the crime of larceny and over all persons charged with that crime. His jurisdiction over the crime, and over the plaintiff charged with it, was invoked by an informing officer whose duty it was to invoke it. When the complaint is laid before him he must do one of two things—issue, or refuse to issue his warrant. If he refuses on the ground that the offense is outlawed, and therefore he has no jurisdiction to issue the warrant, is not his refusal a decision in his judicial character upon the question of his jurisdiction?

On the other hand, if believing he has jurisdiction he decides to issue the warrant, is not such decision equally a judicial determination of the question of his jurisdiction? In both cases in my judgment he has jurisdiction in the fullest sense of the word.

If in the first instance the justice is compelled to decide the preliminary question of his jurisdiction, it follows, if he decides that he has jurisdiction, he does have it—his own decision gives it to him. In this State, justice courts are courts of record. As such they necessarily have power to decide this question. 'Courts of record, having authority over the subject matter, are competent to decide upon their own jurisdiction, and to exercise it to final judgment.' Freem. Judg. s. 122; Grignow v. Astor, 2 How. 340. 'The question whether any offense was or was not committed, that is, whether the indictment did or did not show that an offense had been committed, was a question which that court (a court of record) was competent to decide.' *Ex parte* Watkins, 3 Pet. 206, per Marshall, Ch. J. The records of such courts import verity and need not disclose on their face evidence of jurisdiction. Whereas the doings of inferior courts, as the term is used in the books, must show affirmatively the fact of jurisdiction before verity can be predicated upon them.

Inferior courts have an equal power to decide the question of their jurisdiction; but the decision of the question does not have the conclusive effect that is given to judgments of superior courts.

In Brittain v. Kinnaird, 1 Brod. & Bing. 432, Dallas, Ch. J., says: 'The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and when he has inquired his conviction is conclusive of it.'

In Bradley v. Fisher, 13 Wall. 335, Field, J., says: 'If a judge of a criminal court invested with general criminal jurisdiction over offenses committed within a certain district should hold a particular act to be a public offense, and proceed to the arrest and trial of a party charged with such act, no personal liability to civil action for such acts would attach to the judge, although these acts would be in excess of his jurisdiction or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject matter is invoked.'

In Grove v. Van Duyn, 44 N. J. Law, 654, a complaint was presented to a justice of the peace setting forth certain facts claimed to constitute a criminal offense. In fact no offense was charged as was finally determined. Nevertheless, the court, speaking through Beasley, Ch. J., held that no action would lie against the justice, on the ground that his jurisdiction was invoked by the proper agencies of the law, and thus the question of his right to act in the premises was colorably before him and it became his duty to decide the question of his jurisdiction. The court say: 'When the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong.'

In Lange v. Benedict, 73 N. Y. 12, where the defendant decided for himself that he had jurisdiction to impose a certain sentence upon the plaintiff for violating a criminal statute, it was held, though the defendant's decision was confessedly wrong, that the defendant was not answerable to a private action. The court epitomize the reasoning thus: 'The power to decide protects, though the decision be erroneous.'

A large percentage of cases in the Federal courts involves questions of jurisdiction which those courts decide for themselves; and when, upon their own decisions, they assume jurisdiction, whether the same be rightful or otherwise, the determination is conclusive until overruled by competent authority, and protects all persons acting under it.

Many cases can be found holding that justices of inferior courts are liable for acts extra their jurisdiction; but they are generally cases where in no event, and under no circumstances, could they act at all upon the subject matter before them. Such cases confessedly stand upon sound ground, but they are not in point here.

The proposition here contended for is this. That in cases where the subject matter, as in this case the

crime of larceny, is within the general jurisdiction of the justice to hear and determine, and all persons accused of that crime are subject to arrest under his warrant, and the jurisdiction of the justice over that crime, and this plaintiff as a person accused of it, is invoked by the customary presentment authorized by law; then by the uniform current of authority he cannot be made liable civilly for the erroneous determination of any question arising in the proceedings which he decides judicially from the preliminary question of jurisdiction to final judgment on the merits.

The majority concede that the distinction drawn in some of the cases, English and American, between the responsibility of judges of inferior and superior courts does not exist in this State. The liability of the justice in this case is precisely the same as that of a judge of the Supreme Court, in case the State's attorney had filed in county court an information against this plaintiff for the same offense with the same defective allegation of time, and such judge had thereupon proceeded to the arrest and trial of the plaintiff thereon. It will be noticed that the proposition above advanced, as embodying the law applicable to this case, stands clear of that class of cases where the justice acts when not called upon to act. Morgan v. Hughes, 2 T. R. 225, is a representative case of this class, and is cited by the majority, as upholding this view In that case the magistrate maliciously issued his warrant without any information filed, upon a charge of felony. The action was case, and the exact point in judgment was that trespass, not case, was the proper remedy. In reasoning upon this question A hurst, by way of illustration, says: 'But where a person is committed to prison by the warrant of a justice, without any accusation, some person is guilty of false imprisonment.' To this I agree, and I agree that the person so guilty is the justice. This same doctrine was promulgated more than a century before the case of Morgan v. Hughes. In Windham v. Clere, Cro. Eliz. 130, it was said: 'If a man be accused to a justice of the peace of an offense for which he causeth him to be arrested, although the accusation be false, yet he is excusable; but if the party be never accused, but the justice, of his malice and his own head cause him to be arrested, it is otherwise.'

In the case at bar if the defendant 'of his own head' had issued his warrant he would unquestionably be a trespasser. But the criticism upon the reasoning of the majority is, that these cases upon which they rely are entirely outside the question raised here. In this case the plaintiff was accused by the official having power to accuse. Whether the accusation disclosed on its face the commission of an offense by the plaintiff was properly before the defendant as a judge, and he was called on to decide this question. The power to decide it, must in the nature of things exist, for he is obliged to decide. The issue of his warrant was the conclusion of his judgment upon the question of his right to act judicially upon the complaint.

Applying the jurisdictional test insisted upon by the majority, it is easy to see that their conclusion cannot be sustained. The defendant had jurisdiction to every intent and purpose in the law required.

What is jurisdiction? It is the power to hear and determine a cause. Bou. Law Dic; U. S. v. Arredondo, 6 Pet. 691; Grignow v. Astor, 2 How. 338. Any movement of the court in the cause is an exercise of jurisdiction. State of Rhode Island v. Massachusetts, 12 Pet. 718. It is conferred upon the court by the law, and its scope measured by the law.

Cases can easily be conceived in which the distinction between jurisdiction over the subject matter and jurisdiction over the person, or the process, is manifest. But in criminal proceedings no such illogical distinction can exist; for jurisdiction over the subject matter *ex vi termini* includes the process and the person. There can be no wrongful act without an actor; no larceny without a thief, and no trial without process. Now, when the law gives the judge general jurisdiction to hear and determine a complaint for the crime of larceny, this *per se* gives him full jurisdiction over all persons accused of that crime, and of every process proper to be issued to enable him to "hear and determine the cause."

The jurisdictional test of judicial liability to a civil action has been examined herein, not because I consider it the true test involved, but because the majority, of the court have adopted it. The effort has been to show that, on this footing, the defendant had the requisite jurisdiction, and is thus excusable.

The jurisdictional test, however, as is said in Grove v. Van Duyn, is not the measure of judicial responsibility.

Immunity from liability in favor of judges rests upon the broad ground of public policy, which declares that a judge, for acts done by him in his judicial capacity is absolutely privileged from action. It is an official privilege, which, though it covers a multitude of sins, is still absolutely essential to the due administration of justice. It is a privilege not primarily designed for the protection of the judge, but for the protection of the public, by making the judges free, independent, and fearless in the discharge of their duties. No judge could act independently if conscious that he was exposed to an action by every disappointed suitor in his court. If a judge were liable to action, then the question whether he has properly discharged his judicial duties must be submitted to a jury to determine according to their notions. In like manner the judge trying his case could be sued, his conduct reviewed, and so on *ad finitum*. If this doctrine is to prevail, it is more than probable that vindictive suitors and belligerent counsel will have a large fraction of the trial justices in Vermont upon the dockets of our courts as defendants.

The privilege exempting judges from liability to action is established by a long line of authorities, dating from the earliest times of the common law. In Gwynne v. Poole, 2 Lutw. 387, where a judge of an inferior court had caused the arrest of the plaintiff in a cause over which he had no jurisdiction, general or special, the judge was protected because he acted as judge in a matter over which, he had reason to believe, he had jurisdiction. In Taafie v. Lord Downs, 3 Moore, P. C. 36, n. 1., the plea was held a justification in trepass although it did not show a lawful warrant, but was properly confined to the right of a judge to protection. In Garnett v. Ferrand, 6 Bar. & Cr. 615, a coroner who removed the plaintiff from the room in which he was holding an inquest was held justified on the ground that he acted in his judicial capacity. Kelly, C. B. in Scott v. Stansfield, L. R 3 Ex. 220, says: "A series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition, that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice."

This was an action for slanderous words, but the principle involved is the same, and hence the case is in point. In Kemp v. Neville, 10 C. B. (N. S.) 523, the same rule is declared by Erle, Ch. J. In Munster v. Lamb, decided by the English Court of Appeal, July 3, 1883, reported in 28 Alb. Law Jour. 445, the same immunity from action for slanderous words spoken in the trial of a court was extended to counsel.

In this country the rule is uniformly laid down in the same way. In Grove v. Van Duyn, 44 N. J. Law, 656, Beasley, Ch. J., says: "The doctrine that a

action will not lie against a judge for a wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law." This case goes on the ground of privilege. In Bradley v. Fisher, 13 Wall. 335, the Supreme Court of the United States hold the same way. In Lange v. Benedict, 73 N. Y. 12, the Court of Appeals adopt the same view. To the same effect, *vide* Reid v. Flood, 2 Nott. & McC. 168; Thompson v. Lyle, 3 W. & S. 168; Brodie v. Rutledge, 2 Bay, (S. C.) 69; Yates v. Lansing, 9 Johns. 395; Pratt v. Gardner, 2 Cush. 69. In Dunham v. Powers, 42 Vt. 1, this doctrine of privilege from action was extended to jurors. Indeed, the doctrine may be said to be of universal application to all persons concerned in judicial proceedings, and has grown up from the necessities of the case. In the balance of convenience it is better that an occasional individual wrong be suffered, than that a general public benefit be lost. *Salus populi suprema lex* It extends to members of the legislature by Constitutional enactment: Const. Vt., Art. 14: to ambassadors and public ministers, and quasi-judicial officers, like clergymen, acting in matters of church discipline; Shurtleff v. Stevens, 51 Vt. 501; Farnsworth v. Storrs, 5 Cush. 512; and to numerous other officials, whose duties call them to act in a judicial capacity.

In this State the defence of judicial privilege has never been distinctly raised in any reported case. It is a special defence, and must be specially urged to be available.

In Wright v. Hazen, 24 Vt. 143, the joint plea of the justice and party to the suit was bad as to one, and therefore ill as to both; and the case stood for defence upon the ground of estoppel.

In Courser v. Powers, 34 Vt. 517, the defendant had never taken the official oath. He was not a justice then, but a layman. In Merrill v. Thurston, 46 Vt. 732, the warrant was issued in a matter over which the justice had no jurisdiction, general or special. He was a mere volunteer, issuing his warrant without any preliminary call upon him. But in this case the question of judicial privilege was not raised by court or counsel. Aiken v. Richardson, 15 Vt. 500, was *scire facias* against bail. This question obviously could not be involved. Carleton v. Taylor, 50 Vt. 220, was trespass by the bankrupt against the petitioning auditor. If the District Judge had been defendant the case would have value as authority. Cases where a *capias* has wrongly issued against resident citizens are not in conflict with the position herein taken. A *capias* may issue if an affidavit be first filed setting forth the party's belief that the defendant is about to abscond. Authority under such circumstances is given the justice to act. But this authority cannot be exercised until legally invoked. An oath in writing must be filed as the ground and basis for the exercise of such authority. These cases then are in perfect keeping with the doctrine contended for by the minority, namely; when jurisdiction to act at all is given to the judge, and his jurisdiction is invoked by one having the right to invoke it, then his action is privileged. But if he acts 'of his own head' it is otherwise. If the affidavit is not first filed in cases referred to, the justice acts 'of his own head.' Supposing the affidavit is defective in form, has it ever been decided that the justice is liable if he issues a *capias*?"

VOLUNTARY PAYMENT—FORGETFULNESS—RECOVERY.

MEREDITH v. HAYNES.

Supreme Court of Pennsylvania, March 3, 1884.

1. Money paid under a *bona fide* forgetfulness of facts which disentitle the receiver to receive it, may be recovered back. It is no bar to recovery that one paying money under a mistake of fact, had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate the facts.

2. Therefore, a principal has no ground for objecting to the repayment by his agent of money received under such circumstances.

Error to the Court of Common Pleas of Chester county.

Amicable action, by Henry C. Meredith against E. D. Haines & Co. Meredith who had an account with Haines & Co., private bankers, deposited with them for collection a note payable at the National Bank of Chester County. Haines & Co. discounted the note indorsed by Meredith and placed the proceeds to his credit. Upon the maturity of the note, Haines & Co. presented it at the Bank at which it was payable, and in their settlement received payment for it in cash. Afterwards the Bank, before closing, discovered that the maker of the note had not sufficient funds to meet the note. They went to him and asked him to make good his account; but learning that he had just made an assignment for the benefit of creditors, they went to Haines & Co., and asked them to refund the amount of the note, which they did. Meredith who had notice of the action of the bank, afterwards drew a check upon Haines & Co. for the amount of the note, and, upon their refusal to pay, brought this suit. Judgment was given for defendants, which plaintiff alleges to be erroneous.

C. H. Pennypacker, for plaintiff in error. *R. T. Cornwell* for defendant in error.

Opinion by TRUNKEY, J.

Haines & Co. discounted the note for Meredith upon his indorsement. They, being the owners, presented it at the bank where it was made payable by the maker, and the officer believing that Chambers had sufficient money in the bank, paid it; but before closing, the bank discovered that he had mistaken the account, that Chambers had not money on deposit to pay the note, and called upon Haines & Co. to return the money, which they did. All parties agree that the sole question is, whether Haines & Co. were legally liable to pay back the money to the National Bank of Chester County, for if so, Meredith's claim is without merit of any kind—he had notice the same day and was fully informed of the transaction with the national bank.

That money paid under a mistake of fact may be recovered back is so authoritatively settled, that the principle is not controverted by the plaintiff. He seems to think some duties rested

upon Haines & Co., as brokers, by which they could hold the money, after getting it in their hands, even if another person could not; but he has not shown their superior rights. Money paid by the plaintiff to the defendant under a *bona fide* forgetfulness of facts, which disentitled the defendant to receive it may be recovered back; it is not sufficient to prevent a party from recovering money paid by him under a mistake of fact, that he had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate facts: Kelly v. Solari, 9 M. & W. 54. That was a case where the directors of a life insurance company had been informed that the policy was forfeited in the lifetime of the insured, and after his death, having forgotten the fact, paid the money on demand of the administratrix. Where the plaintiff, having an account with Post, made up a statement showing a balance due Post of $10,643.10, which they paid to the defendant, assignee of Post, and afterwards discovered that they had omitted to charge Post with $5,000, loaned to him, it was held that they were entitled to recover. The defendant claimed that the plaintiffs were negligent, and had the means of discovering the mistake at and before the time of payment; but the court remarked: "Negligence in making a mistake does not deprive a party of his remedy on account thereof. It is the fact that one by mistake unintentionally pays money to another to which the latter is not entitled from the former, which gives the right of action:" Lawrence v. American National Bank, 54 N. Y., 432.

NOTE.—In the court of Common Pleas, Futhey, P. J., said: "The question presented for consideration is, whether the bank could lawfully require the defendants to refund the moneys thus received by them. It is a general principle that if a man through some mistake, or misapprehension, or forgetfulness of facts, has received moneys to which he is not justly and legally entitled, and which he ought not *in foro conscientiae* to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise from him to pay over the amount to such owner; and if the money has been paid under forgetfulness or a mistake of facts, the person making the payment is entitled to recover back the money: 3 Addison on Contracts, secs. 1406, 1408; 2 Daniel on Negotiable Instruments, secs. 1226, 1243, 1369; McCrickart v. Pittsburgh, 7 Norris, 133. In the case before us the bank in paying the note in question did not intend to pay it with their own moneys; they supposed they were paying it with the moneys of the maker. We are of opinion the case comes fully within the principles referred to, and that the bank having made the payment under a clear mistake of fact, was entitled to recover back from the defendants the moneys thus mistakenly paid them, unless the rights of the receivers of the moneys or of the indorser of the note had been prejudiced by the mistake, so that it would be inequitable to require the moneys to be refunded: 3 Addison on Contracts, sec. 1409; 2 Daniel on Negotiable Instruments, sec. 1369; Tybout v. Thompson et al., 2 P. A. Browne, 27. We cannot see that the rights of any one have been thus prejudiced. Had the moneys of the bank not been mistakenly paid the indorser would have been responsible to the holder of the note. That the moneys thus paid by mistake were handed back did not injure the indorser. It left him in the same position. They were not the moneys of the maker."

EVIDENCE—FELONY OF WITNESS—PRESENT GOOD CHARACTER.

GERTZ v. FITCHBURG R. CO.

Supreme Judicial Court of Massachusetts, March, 19, 1884.

When the plaintiff has testified and defendant has put in evidence the record of plaintiff's conviction for a felony, plaintiff may offer evidence of his present reputation for truth and veracity.

Action of tort for personal injuries.

At the trial below certain evidence was admitted and other evidence excluded, as stated in the opinion, and the verdict being for the defendant the plaintiff excepted.

Myers & Warner for plaintiff. *Sohier & Welch* for defendant.

HOLMES, J., delivered the opinion of the court:

In this case, the plaintiff having testified as a witness, the defendant put in evidence the record of his conviction in 1876 in the United States district court of the crime of falsely personating a United States revenue officer. The plaintiff then offered evidence of his character and present reputation for veracity, which was excluded subject to to his exception. We think that the evidence of his reputation for truth should have been admitted, and that the exception must be sustained. There is a clear distinction between this case and those in which such evidence has been held inadmissible, for instance, to rebut evidence of contradictory statements. Brown v. Mooers, 6 Gray, 451; Russell v. Coffin, 8 Pick. 143. Or where the witness is directly contradicted as to the principal fact by other witnesses. Atwood v. Dearborn, 1 Allen, 483. In such cases it is true that the result sought to be reached is the same as in the present, to induce the jury to disbelieve the witness. But the mode of reaching the result is different. For while contradictions or proof of contradictory statements may very well have the incidental effect of impeaching the character of truth for the contradicted witness in the minds of the jury, the proof is not directed to that point. The purpose and only direct effect of the evidence is to show that the witness is not to be believed in this instance. But the reason why he is not to be believed is left untouched. That may be found in forgetfulness on the part of the witness, or in his having been deceived, or in any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general good character for truth as well as for the

other virtues. And until the character of the witness is assailed it cannot be fortified by evidence. On the other hand, when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit. 1 Gilb. on Ev. (6th ed.) 126. The conviction in the United States district court was for a felony punishable with imprisonment (U. S. Stat. 1867, c. 196, sec. 28); and assuming that it stands on the same footing as a conviction in another State, it would have been admissible, according to the *dicta* in our cases, independent of statute, not to exclude the witness, but to impeach his credit. Commonwealth v. Green, 17 Mass. 515, 641; Commonwealth v. Knapp, 9 Pick. 496, 511; Udley v. Merrick, 11 Met. 302. See R. S. c. 94, sec. 56. And when a conviction is admitted for that purpose it always may be rebutted by evidence of good character for truth. Commonwealth v. Green, *ubi supra*; Russell v. Coffin, 8 Pick. 143, 154; Rex v. Clarke, 2 Starkie, 241; Webb v. State, 29 Ohio St. 351. It is true, that a doubt is thrown upon this doctrine in Harrington v. Inhab. of Lincoln, 4 Gray, 563, 568, but that case was decided on the ground that the cross-examination which showed that the witness had been charged with a crime also showed that he had been acquitted, and cannot be regarded as an authority against our decision, whether the *ratio decidendi* adopted be reconcilable with later cases or not. Commonwealth v. Ingraham, 7 Gray, 46. The applicability of the foregoing reasoning is made clear by the language of our statutes. By Pub. Stats. c. 169, sec. 19, the only purpose for which conviction of a crime may be shown in any case is to affect credibility. Even if the conviction proved here would have excluded the witness but for the statute cutting down its effect, it could not be maintained that evidence of reputation for truth remained inadmissible, because it would have been so when the witness was excluded. The statute puts all convictions of crime on the same footing, those which formerly excluded, those which always have gone only to credibility, and, it would seem, those which formerly would not have been admissible at all. (We assume that the words "a crime" in Pub. Stats. c. 169, sec. 19, mean the same as "any crime" in Stat. 1870, c. 393, sec. 3; G. S. c. 131, sec. 13; Stat. 1852, c. 312, sec. 60; Stat. 1851, c. 233, sec. 97; Commonweal.h v. Hall, 4 Allen 305.) And, therefore, any evidence which was admitted to rebut a conviction that only discredited, before the statute, must now be admissible to rebut all convictions that may be put in evidence. Whether any different rule would apply when the fact is only brought out on cross-examination we need not consider.

The exception to the exclusion of evidence that the witness was innocent of the offense of which he was convicted, and explaining why he was convicted, is not much pressed, and is overruled. Commonwealth v. Gallagher, 126 Mass. 54.

Exceptions sustained.

WEEKLY DIGEST OF RECENT CASES.

1. ASSIGNMENT—AUTHORITY TO SELL ON CREDIT.
   Authority given an assignee by an assignment for benefit of creditors, to sell the property of the assignor, for cash, or on credit, does not avoid the assignments. *Badenach v. Slater*, S. C. Ont., June, 1884.

2. CHATTEL MORTGAGES—LIEN FOR REMOVING GOODS.
   No lien for the removal and storage of goods at the request of a mortgagor in possession thereof is acquired against the mortgagee, whose mortgage is duly recorded, although its existence is not actually known to the party who stores the goods. *Storms v. Smith*, S. J. C. Mass., May 10, 1884; 18 Rep. 110.

3. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.
   An act exempting the employes of certain railroads from the duty of working on public roads is not an irrevocable contract with the roads or the laborers, but may be repealed. *In re Thompson*, S. C. Fla., June Term, 1884.

4. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—CHANGE OF TAX LAWS.
   The requirement of a constitution that a mortgagee pay a certain portion of the taxes on mortgaged premises, does not impair the obligation of the contract of a mortgagor on a mortgage executed prior to the adoption of such provision, but to mature after it, whereby he agreed to pay all the taxes. *Hay v. Hill*, S. C. Cal., July 18, 1884; 4 Pac. Rep. 378.

5. CORPORATION—TRANSFER OF STOCK—STATUTORY CONSTRUCTION.
   The provision in a charter that a stockholder may transfer his interest in the stock, but the "trans-

fer shall not be binding unless entered on the books of the company," is a provision for the protection of the company, and does not affect a transfer as between holder and assignee. *State ex rel v. Commissioners*, S. C. Fla., June Term, 1884.

6. CRIMINAL LAW AND PROCEDURE—WARRANT OF ARREST—AFFIDAVIT.
Complaint or information charging a defendant with a misdemeanor, and verified on nothing but hearsay and belief, is not sufficient to authorize the issuance of a warrant for the arrest of the party therein charged, when no previous preliminary examination and no waiver of the right to such examination has been had. *State v. Gleason*, S. C. Kan. July 3, 1884; 4 Pac. Rep. 363.

7. DEED—FEE SIMPLE—REPRESENTATIVES.
A deed to one and his "representstives" does not pass to him a fee simple, the word "representatives" not being equivalent to the word "heirs." *Mattocks v. Brown*, S. C. Pa. 14 Pitts. L. J. 513.

8. EMINENT DOMAIN—WAIVER OF LIEN.
Consent to enter upon the land, to construct the road, the arrangement as to the damages, their appraisal by the commissioners, do not constitute a waiver of the lien which the owner of land appropriated by a railroad has for the payment of the damages. *Kittle v. Missisquoi R. Co.*; *Hart v. Same*; *Bugbee v. St. J. & L. C. R. Co.*; *Dean v. Same*, S. C. Vt. Reporter's Advance Sheets.

9. EQUITY—ATTACHING CREDITOR.
The lien of an attachment is sufficient to enable a creditor to maintain a suit in equity to set aside a fraudulent assignment of the property attached; particularly under sec. 148 of the Or. code of C. P., which makes an attaching creditor a *bona fide* purchaser for a valuable consideration. *Kahn v. Salmon*, U. S. C. C. D. Oreg. July 18, 1884; The Oregonian July 21, 1884; 3 W. C. Rep. 383.

10. EQUITY—INJUNCTION.
Defendant's attorney's wrote letters to dealers in hammocks stating that hammocks made by the complainant infringed the patent of defendant and threatening suits for the infringement. *Held*, that a bill in equity for an injunction would not lie, there being neither allegation nor proof that the defendant threatened to continue such statements and threats. *Palmer v. Travers*, U. S. C. C. S. D. N. Y. 18 Rep. 99.

11. EVIDENCE—ADMISSION OF NEGLIGENCE—SUBSEQUENT CONDUCT.
Admission of previous negligence is not shown by evidence that just after the injury the company made repairs where the injury occurred. *T. & P. R. Co. v. Burns*, S. C. Tex. 4 Tex. L. Rev. 54.

12. EVIDENCE—PAROL—EXPLANATION OF TAX RECEIPT.
When a property owner pays the city's assignee for his share of a municipal improvement, his lot is discharged from liability; and, if he can show that this was the intention of the parties to the transaction, he will not be prejudiced by the fact that the receipt describes the land of one of his neighbors. *Wolf v. Philadelphia*, S. C. Pa. 41 Leg. Int. 306.

13. EVIDENCE-PAROL EVIDENCE-PAYEE OF SEALED NOTE.
Parol testimony may be introduced to prove who was the payee of a sealed note, executed by three parties, whereby they jointly and severally promised "to pay $698.89 with interest annually, for value received of him." *Barkley v. Tarrant*, S. C. So. Car. 18 Rep. 121.

14. INSURANCE—FIRE—VACANCY—RENTED DWELLING.
A policy upon a dwelling-house contained a provision that "if the dwelling-house hereby insured shall cease to be occupied as such then this policy shall cease and be of no more effect." The house was occupied by a tenant, and was so described. The tenant left the house about six o'clock p. m., and it was destroyed by fire about two o'clock the next morning. *Held*, non-occupation avoided the policy. *Bennett v. Agricultural Ins. Co.* S. C. Conn. 18 Rep. 104.

15. INTEREST—RATE AFTER MATURITY.
The doctrine that the contractual rate of interest continues after the maturity of negotiable paper is adopted in Florida. *Lewis v. Jefferson County*, S. C. Fla. June Term, 1884.

16. JURISDICTION—COLLATERAL ATTACK.
In a suit upon a trustee's bond after his removal from office, he cannot object that his removal was improper, on the ground that all the parties were not before the court. That was a ground for appeal; but not of collateral attack. *McKim v. Doane*, S. J. C. Mass. 7 Mass. Rep. July 17, 1884.

17. JURY—COMPETENCY—INTEREST IN SAME QUESTION.
In a suit against a county upon its bonds when the validity of the bonds is in question, a holder of similar bonds may be challenged for cause when drawn as a juror. Being interested in the question to be tried is cause of bias as a matter of law. *Lewis v. Jefferson County*, S. C. Fla. June Term, 1884.

18. LIMITATIONS—CRIMINAL STATUTES.
Criminal statutes of limitations run against the offences from their commission, not from the time of their discovery. *Vaughn v. Congdon*, S. C. Vt. Reporter's Advance Sheets.

19. LIMITATIONS—JUDGMENT—PRESUMPTION OF PAYMENT.
Where a debtor is aware of, and does not object to the renewal of an execution after the expiration of twenty years after the rendition of judgment, it is an acknowledgement of indebtedness which overcomes the presumption of payment. *McNair v. Ingraham*, S. C. So. Car. April 3, 1884.

20. MANDAMUS—AGAINST CORPORATION—STOCKHOLDERS RIGHT TO INSPECT BOOKS.
A writ of mandamus may go against a corporation at the instance of a stockholder, to inspect the corporate books and papers in reference to some distinct defined dispute as to which the shareholder wishes to file a bill against the corporation, and such inspection is necessary to enable him to state the facts in his bill. *Com. ex rel. v. Phœnix Iron Co.* S. C. Pa. Mar. 31, 1884; 41 Leg. Int. 304.

21. NEGLIGENTLY SPREADING CONTAGIOUS DISEASE—BOARDING-HOUSE—ACTION FOR DAMAGES.
Defendant took his children when they had whooping-cough, a contagious disease, to the boarding-house of plaintiff to board, and by reason of his negligence, her child, and the children of other boarders, contracted the disease, whereby she was put to expense, care, and labor in consequence of her child's sickness, and sustained pe-

cuniary loss by reason of boarders being kept away. *Held*, that defendant was liable for damages. *Smith v. Baker*, U. S. C. C. S. D. N. Y. July 5, 1884; 20 Fed. Rep. 709.

22. ONCE IN JEOPARDY — ASSAULT AND ASSAULT WITH INTENT TO KILL NOT SAME OFFENSE.
A conviction of assault and battery, upon a plea of guilty, in a justice's court, constitutes no bar to a subsequent indictment for assault with a deadly weapon with a premeditated design to effect death, or an aggravated assault, based on the same act. *Boswell v. State*, S. C. Fla. June Term, 1884.

23. PARENT AND CHILD—WILFUL NEGLIGENCE OF CHILD.
A father who permits his minor children to commit acts on his premises calculated to result in injury to persons on the highway is responsible to such person for the resulting injury. *Hoverson v. Noker*, S. C. Wis. May, 1884; 18 Rep. 126.

24. PENSIONS—SECOND MARRIAGE—FIRST HUSBAND LIVING.
A woman who continues to live with her second husband after ascertaining that her first husband, whom she supposed to be dead, to be still alive, cannot claim a pension, on account of her former husband having died in federal service. *United States v. Hays*, U. S. C. C. W. D. Mo. 20 Fed. Rep. 710.

25. PLEADING—SLANDER—DEFENSE—DENIAL—JUSTIFICATION.
In an action for slander the defenses that the language imputed was not used, that it was true, are not inconsistent with each other, and both may be true. *Cole v. Woodson*, S. C. Kan. July 3, 1884; 4 Pac. Rep. 321.

26. PRESUMPTION OF GUILT FROM BEING ENGAGED IN PARTICULAR BUSINESS.
The fact that one is a grocer, rather than in any other line of business, should not raise a presumption of wrong-doing against him, in case of his purchasing a barrel of whisky to oblige a customer, and his entering on his books a charge therefor. *United States v. Howell*, U. S. C. C. W. D. La ; 20 Fed. Rep. 718.

27. REMOVAL OF CAUSES—DILIGENCE OF APPLICANT.
The law requires diligence on the part of the applicant for removal. He cannot remain passive, and then, after the lapse of several terms of the State court, make an application for removal. *Nat. Bank of Clinton v. Dorset etc. Co.*, U. S. C. C. N. D. Ill. 20 Fed. Rep. 707.

28. REVENUE LAWS—LIQUOR LICENSE—PURCHASE FOR ANOTHER WITHOUT RECEIVING PROFIT.
A grocer who, without obtaining a license for selling liquor, purchases a barrel of whisky for a customer, and enters on his books a charge against the customer for the price at which it was actually obtained from the liquor dealer, does not transgress the spirit of the revenue laws. *United States v. Howell*, U. S. C. C., W. D. La. 20 Fed. Rep. 718.

29. SET OFF—NOTE TRANSFERRED AFTER MATURITY.
The maker of a promissory note, transferred after maturity, sued in the name of the holder and owner, cannot plead in offset a claim in his favor against the payee; but under the general issue, he can make any defense, which grew out of the note transaction, or out of any agreement between himself and the payee in relation to the note. *Haley v. Congdon*, S. C. Vt. Reporter's Advance Sheets.

30. TAXATION—ASSESSMENT OF PERSONAL PROPERTY—INJUNCTION.
Where personal property is subject to assessment and taxation, and the taxing officers have jurisdiction over it, but the assessment thereof is excessive, no injunction will lie until the amount of taxes, upon a reasonable and fair valuation of the property, is paid or tendered. *Wilson v. Long n-dyke*, S. C. Kan. July 3, 1884; 4 Pac. Rep. 361.

31. WILL—CLAUSE IN DEED.
A deed from A to B *et ux* conveyed a life estate to said B and wife. The deed contained a clause, if B should survive A the premises in question should go to the "five children and their representatives of the said B." *Held*, that this paragraph did not convert the deed into a will. *Mattocks v. Brown*, S. C. Pa. 14 Pitts. L. J. 513.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

21. A is an agent with power to sell a particular article, but has no authority to collect. B is his principal. A sells one of the articles to C, and without authority takes C's check, payable to B's order, for amount of purchase price. A then goes to D with check, and in his presence endorses it, B, per A, and D discounts the check. A had no authority to endorse. Is A guilty of forgery? M. B.
Detroit.

RECENT LEGAL LITERATURE.

REED ON THE STATUTE OF FRAUDS. A treatise on the Law of the Statute of Frauds and of other like enactments in force in the United States of America and in the British Empire. By Henry Reed of the Philadelphia Bar. In three volumes. Vol. 1. Philadelphia. Kay & Bro. 1884.

We had supposed that Browne's treatise on this subject was thorough enough for all practical purposes, but, as Mr. Reed says in his preface, "the accumulation of reported cases is going forward so rapidly, that the question of making them available to the busy practitioner is one which grows more serious every year." This treatise is one written on a grander scale than that of Browne's, three volumes being contemplated to be written by the author. In the volume before us, the History of the Statute of Frauds and

policy and value, the *lex fori* and *lex loci contractus*, Guaranties in General, the Promise, the Consideration, the parties to the Guaranty, the Subject matter of the Guaranty, Promises by Administrators or Executors to answer out of their own estates, Promises in consideration of marriage, Year, Contracts relating to Chattels, Delivery, etc., Public and *quasi* public sales, The memorandum in general, Various kinds of memoranda, The nature of the memorandum, Memorandum on separate papers, The Execution of the Memorandum in General by the parties, by the agent, Signature and other details of Execution, The Contents of the Memorandum, the Contract in General, Terms and Conditions, Description of the parties, Subject matter of the contract, The Price, the Consideration, are exhaustively treated in a manner which shows beyond dispute that its author possesses talent for law writing of no mean order. In these days, it is a source of some gratification to be able to lay one's hands upon a law book which is beyond criticism. Perhaps it may be said that the first volume should not have been issued without an index, unless the subsequent volumes were issued with it. This is an objection of small, if of any, moment. The book possesses every element of success; a clear style, arrangement which cannot be excelled, a discussion of the cases, conclusively showing a thorough grasp of every principle and familiarity with the adjudications. A book with such a "letter of introduction" is one not to be overlooked. Such books should be supported, not only because the profession should encourage such efforts, but by way of tribute to well spent labor.

MYER'S FEDERAL DECISIONS. Cases Argued and Determined in the Supreme Court and District Courts of the United States; comprising the opinions of those courts from the time of their organization to the present date, together with extracts from the opinions of the Court of Claims and the Attorneys-General, and the opinions of general importance of the teritorial courts. Arranged by William G. Myer, Vol. 5, St. Louis, 1884. Gilbert Book Co.

This volume takes us from California to Conspiracy, which some may be so cruel as to say is not such a great distance, but when it is considered that before you arrive at that point, you are obliged to overcome the railway corporations, the task is not so devoid of difficulty after all. The arrangement of the book seems to have been conceived with some attempt at wit. From California, you, James-like, "go through" the Common Carriers, into the Churches, to Congress, whence you emerge into Conspiracy. We had to pass the "Benevolent Associations," as those are generally sought after your constituency "elects you to stay at home." To be serious, the subject of carriers occupies over two-thirds of the volume, being personally edited by James Schouler of Boston, Mass., the well known author of treatises on Bailments, Personal Property, Domestic Relations, Husband and Wife, Executors and Administrators, and a History of the Federal Constitution. He is also Public Administrator of Boston, and a lecturer at the Boston Law School, as well as a practitioner. The two subjects of Champerty and Maintenance, and Churches and Benevolent Associations, which happily go together, were "finally edited" by Melville M. Bigelow, the well known author of works on Estoppel, Torts, etc., the preliminary editing having been done by T. B. Wallace, Esq., under Mr. Myer's supervision, and Citizens and Aliens was edited, it seems, by Mr. Myer, the final editing being done by Mr. Schouler. This seems to be a "Hub" volume, two-thirds of the principal editing and all the final editing having been done in the "Hub." Perhaps it would not be out or place to suggest that there is talent enough outside the "Hub," to warrant the publishers of this series in furnishing some labor upon it, to men who do not boast of their having been born under the eaves of Fanneil Hall. One of our contemporaries can furnish them with a good list of Western talent. Common Carriers is divided into nine grand divisions; Common Carriers in General, Receiving goods for Carriage, Responsibilities as the Carrier at Common law, Carriers Responsibilities as specially Modified, Delivery by Carrier, His Compensation, etc., Actions by and against Common Carriers, Connecting Carriers, Carriers of Passengers and Express Companies. Churches are not divided except "against themselves." "Citizens and Aliens" is divided into Citizenship and Allegiance, Expatriation, Aliens and Naturalization. This volume is fully up to the high standard of the previous volumes, and carries out the idea of the whole undertaking, *i. e.*, to furnish labor done by competent hands. The competency of Professor Schouler, for the work done by him, is proved by the recognition of his work by the profession, particularly his treatise on Bailments. This enterprise is meeting with the success it deserves. It was a great venture, but all doubts of its success as a whole have been dispelled. It has already excited the spirit of rivalry. The imitator is already on the "war path." Those whose wits (if they have any) are always dormant until they see the products of the genius of others, are eager to pull it down and it becomes the profession to give it a stimulus, such as will make imitators heed its meaning. The next volumes, six and seven, will be upon the subjects of Constitution and Laws, which will include Constitutional Law, Constitution of United States, Law of Nations, State Laws and Constitutions, Common and Foreign Law, Statutes, and Conflict of Laws. Let those "on the fence" enroll themselves on the subscriber's list.

LEGAL MISCELLANY.

VALUE OF THE HUMAN BODY.

[*In the Medico-Legal Journal.*]

The *Canadian Law Times* sometime since contained quite an elaborate article on the above subject, and cited many interesting cases as to the estimated value by courts and juries of bones and brains.

In Maine, a man who could say with Hudibras,

"My head's not made of brass,
As Friar Bacon's noddle was;
Nor—like the Indian' skull—so tough,
That authors say 'twas musket proof."

had the external table of his skull cracked by an iron poker, wherewith he had been assaulted by a brakesman, and in consequence of the injury he was threatened with palsy of the optic nerve. He sued the railway company for the wrong inflicted by their servant, and recovered $4.000 damages; and although the company considered the amount excessive the court did not; Hanson v. European, etc., R. Co. 62 Me. 84. But $1,700 was held too much to pay for striking a woman's head with a hatchet, she having been very provoking and not being much hurt; Hennies v. Vogel, 87 Ill. 242. When on a steamboat a person received an injury resulting in the temporary loss of the sight of one eye, and the jury calculated the damage at $5,000, the judges held the amount excessive and ordered a new trial on that account; Tenney v. New Jersey Steamboat Co., 5 Lans., 507. The jury, although not judges, evidently considered this one of

"Those eyes, whose light seem'd rather given,
To be ador'd than to adore—
Such eyes as may have look'd from Heaven,
But ne'er were raised to it before."

A judge and jurors attempted to estimate the worth of a man's brains in a late case. They calculated the value of that part of the brain that was injured (whether the bump of philoprogenitiveness, veneration or self-esteem, the reporter saith not, but we think it was the first named) at $10,000. Roy was sitting in a Pullman car and the upper berth fell once and again, the second time striking him on the head, injuring his brain, incapacitating him from the performance of his usual avocations, and necessitating medical treatment. The court held the railway company liable, but granted a new trial solely on the ground that the number and ages of the man's children had been given in evidence, apparently to influence the verdict of a jury; Penn. R. Co. v. Roy, 22 Alb. J. 510.

An injury to the vertebræ of the spine of a lady, married, had to be paid for by £500. Mr. and Mrs. Foy were traveling by rail; at the station where they stopped there was not room for all the cars to draw up to the platform, and some of the passengers, the Foy's among the rest, were asked to get out upon the line. Mrs. F., with the aid of Mr. F., jumped from the top step of the car to the ground, a distance of three feet, and came down very heavily, jarring her vertebræ and injuring her spine. An English jury gave her the sum mentioned and the judges declined to interfere; Foy v. L. B. & S. C. R. Co. 18 C. B. (N. S.) 225.

In Wisconsin $27,500 was given for the fracture of one of the spinal vertebræ and the dislocation of the hip joint, and the court did not consider the sum exorbitant. Houfe v. Fulton, 34 Wis. 408. Nor did the court in Illinois think $7,500 too much for a healthy young woman, who, through a defect in a sidewalk, fell and fractured her lower vertebræ so that paralysis ensued. Chicago v. Herz, 87 Ill. 547.

These citations are interesting to the doctor and to the lawer; to the latter as some criterion of the value the courts and juries put upon brains and bones, and to the former as showing them the necessity of discharging the duties of their profession with faithfulness.

JOHN F. BAKER.

CONTRIBUTORY NEGLIGENCE.

In Louisville C. & L. R. Co. v. Sullivan, the Kentucky Court of Appeals recently, affirmed a recovery by plaintiff, who, while drunk, got on defendants railway train, and refusing or failing to pay his fare, was put off by the conductor in the snow, and by exposure to the cold was severely frozen and lost several of his toes and fingers. The court cited and approved the doctrine of Isbel v. New York & N. H. R. Co., 27 Conn. 393, where it was said: "A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important if thereby a calamitous injury can be avoided or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incident to human affairs. Premature remedies must therefore always be proportioned to the case in its peculiar circumstances—to the imminency of the danger, the evil to be avoided and the means at hand to avoid it—and herein is no novel or strange doctrine of the law; it is old as the moral law itself, and is laid down in the earliest books on jurisprudence. A boy enters a door yard to find his ball or arrow, or to look at a flower in the garden; he is bitten and lacerated by a vicious bull dog; still he is a trespasser, and if he had kept away would have received no hurt.—Nevertheless, is not the owner of the dog liable? A person is hunting in the woods or crossing a pasture of his neighbor and is wounded by a concealed gun. Is he in such case remediless because he is there without consent? Or, an intoxicated man is lying in the travelled part of a highway, helpless, if not unconscious, must I not use care to avoid him? May I say that he has no right to encumber the highway, therefore carelessly continue my progress regardless of consequences? Or, if the intoxicated man had entered a private lane or by-way, and will be run over if the owner does not stop his team, which is passing through it, must he not stop them? It must be so that an unnecessary injury, negligently inflicted in these cases, is wrong, and therefore unlawful. The duties which men owe to each other in society are mutual and reciprocal, and faulty conduct on the part of another never absolves one from their obligations, though such conduct may materially affect the application of the rule by which this duty is to be determined in the particular instance." The court also cited 28 Iowa, 348; 37 Cal. 400, and 52 Iowa, 533.

In Baldwin v. St. Louis, K. & N. W. R. Co., decided April, 1884, the Supreme Court of Iowa held that in an action for a personal injury a plaintiff cannot be deemed to have been necessarily guilty of contributory negligence, if the danger might have been seen, and avoided, if seen, following Greenleaf v. Dubuque & Sioux City R. Co. 33 Iowa, 59.

The law on this subject of contributory negligence in this State, as it may be gathered from the decisions of the Court of Appeals, seems to be that the plaintiff, in an action for damages for personal injuries, the alleged result of defendant's negligence, cannot re-

cover, if by his own fault or absence of such ordinary care as a prudent man would take of himself under the circumstances, his own negligence was the proximate cause of the accident. Massoth v. Del. & H. C. Co. 64 N. Y. 524.

To justify a non-suit on the ground of contributory negligence, the negligence must appear so clearly that no construction of the evidence or inference drawn from the facts would have warranted a contrary conclusion, and that a verdict the other way would have been set aside as against evidence. Kain v. Smith, 89 N. Y. 375.

In the case of Barker v. Savage, 45 N. Y. 191, the plaintiff, an aged woman, lame and wearing a hood which impaired her sense of hearing, was run over by the defendant's cart, then moving on the street at the rate of four miles an hour. The driver, when about twelve feet from the plaintiff, shouted to her and pulled in his horse. Plaintiff paid no attention to the shout, continued to advance, and was struck and injured. The trial judge charged the jury that a person crossing a street had the right of way. A driver was bound to take care for him. A person crossing a street was not bound to look up or down, but only straight before him, and the driver was bound to avoid a collision with him. Judge Grover, delivering the judgment of the court, held that this charge was erroneous. That although less care is required in crossing streets of cities at the usual crossings than at railway crossings, because vehicles traveling thereon move at less speed than railroad trains, and are, to a greater extent, under the immediate control of those having charge of them, nevertheless reasonable care requires in all cases the exercise of vigilance proportioned to the danger encountered.

The measure and degree of care, the omission of which constitutes negligence, is to be graduated by the age and capacity of the individual, and how far the intoxication of a plaintiff even may be held a contributory cause of the accident should be submitted to the jury. Thurber v. Harlem R. etc. R. Co., 60 N. Y. 326; Milliman v. N. Y. C. & H. R. R. Co., 66 N. Y. 642.

In the recent case of Harnett v. The Bleecker St. R. Co., reported in 49 N. Y. Superior Court Reports, the New York Superior Court held that "absence of contributory negligence is part of the plaintiff's case." This rule was rigorously applied by the court where it appeared that the plaintiff, a woman upward of sixty-four years of age, was knocked down and injured by a street car while attempting to cross a street at a street crossing; that before starting to cross the street she looked and saw a car approaching and pass, and not seeing another car which was also approaching, and which for a short time had been obscured by the first car passing, started to cross the street without looking for further obstructions, and was suddenly run down by the approaching car, which was going down a slight grade at a rate of speed variously estimated by witnesses at from five to eight miles an hour. The dismissal of the plaintiff's complaint was sustained by the court at General Term.—*The Buffalo Daily Transcript.*

QUIBBLES OF THE LAW.

The following is an accurate copy of remarks made by a prominent lawyer in this State in his court docket:

"Citation is unnecessary if the justice of the peace is on your side, and will give you a judgment, or hold he defendant to answer without one; because, while the judgment is absolutely void so obtained, yet the defendant has no remedy except to appeal, and then he brings himself into court, and his case is tried *de novo*, and that is all you want; or, if the fool lets the time for appeal or *certiorari* pass, he can then enjoin your void judgment by giving you a valid one, which is just what you want. (See fully Tex. Ct. App. civil cases, by White & Wilson, 457-9-60.) But the best way, if the court is with you, or, in other words, if you run the court, is to sue the defendant out of his precinct, and he will not be so apt to put in his appearance to beat you, and then you get your judgment by default, which, of course, is void and worthless. If the defendant kicks, he will have to give you a valid judgment, if you are entitled to it, which is called equity, or returning good for evil. (See Tex. Ct. App. civil cases, 457-72, 25 Tex. Sup. 284; Acts of 1846, sec. 56, p. 376; 21 Tex. 186; Constitution, art. 5, sec. 16.) The thing is to have the court on your side. See acts of J. P. in term time.—*Texas Law Review.*

TOMPKINS AS A JURYMAN.

"The idea of putting John on a jury!" exclaimed Mrs. Tompkins, when she heard that her husband had been drawn. "They might as well order a new trial right off. They won't get John to agree on a verdict. He is the most obstinate man I ever saw. I never knew him to agree with his own wife in anything, and it isn't at all likely he's going to agree with people he don't know anything about. A pretty juryman he is!"—*Ex.*

NOTES.

——"What is a kiss?" asks the *Pall Mall Gazette.* "The question can only be answered by experience; *solvitur osculando.* But it is easy after a decision in the Lambeth County court yesterday to say what a kiss is not. It is not legal 'consideration.' A surgeon in Lambeth kissed a workingman's wife; the husband valued the kiss at five pounds, and the surgeon gave an I O U for that amount. A month after date an action was brought on this document, but the judge promptly ruled there was no consideration and gave a verdict for the defendant. Perhaps the lady was in court, and the judge may have been influenced by that. For even the poets admit that there are kisses and kisses! The interesting question is whether yesterday's judgment was meant to lay down a general principle, or whether every case must be decided on its merits."

——The following anecdote of Baron Alderson may not be generally known. It must be premised that his lordship was suspected of being a bit of a free-thinker. A child of tender years was once being examined before him on the *voir dire.* She could make nothing of the phrases "nature of an oath," "religious responsibility," and so forth, used by counsel, and at last Alderson said, "I will put it to the witness very simply. My little girl, if you tell a lie here, do you know where you will go hereafter?" "No sir," replied the child. "No more do I!" muttered the Baron, aside; and then, turning to the witness, "I am afraid you must stand down."—*Pump Court.*